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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. [redacted] 19

NEPTUNE METER COMPANY,

Petitioner,

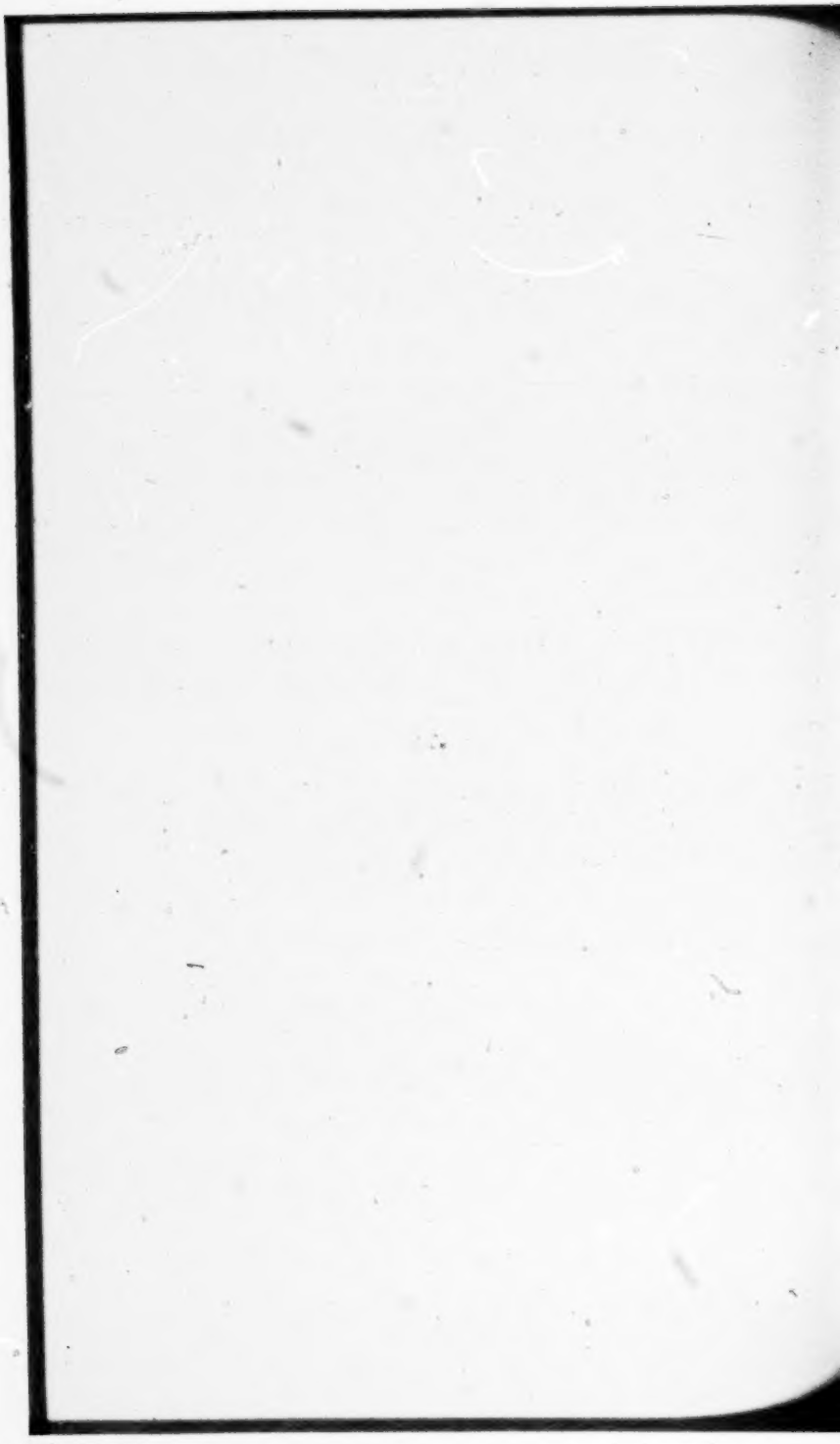
against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

EDWARD L. COFFEY,
Counsel for Petitioner.



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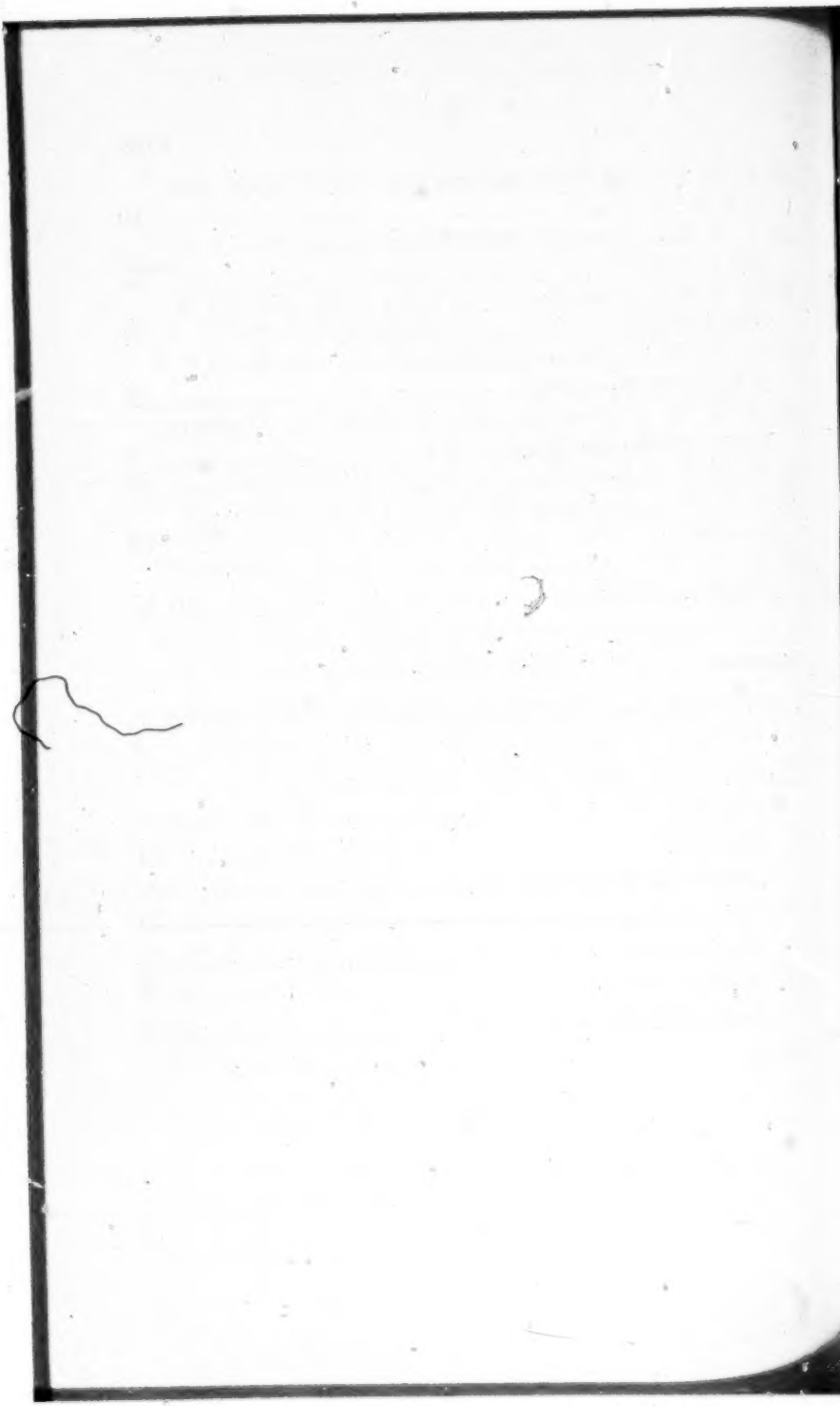

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NEPTUNE METER COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Neptune Meter Company, respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 20, 1946 modifying and, as modified, enforcing an order of the National Labor Relations Board dated March 6, 1946.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 753-773) has not, as yet, been officially reported. The findings of fact, conclusions of law and

order (R. 670-700) of the National Labor Relations Board (hereinafter referred to as the "Board") are reported in 66 N. L. R. B. 292.

Jurisdiction

The decree of the Circuit Court of Appeals sought to be reviewed was entered on December 20, 1946 (R. 774-776). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (43 Stat. 938, 28 U. S. C. Sec. 347(a)) and Section 10(e) and (f) of the National Labor Relations Act (49 Stat. 454, 29 U. S. C. Sec. 160(e) and (f)).

Statute Involved

The statute involved is the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*, hereinafter referred to as the "Act"). The pertinent provisions of the Act are set forth in the appendix to the accompanying brief.

Statement of the Case

The Circuit Court of Appeals for the Second Circuit by a divided court has affirmed an order of the Board finding that petitioner had violated the Act by dominating a labor organization known as Independent Employees Association (hereinafter referred to as IEA) and ordering petitioner to "disestablish" the IEA and not to recognize or deal in the future with any labor organization as the representative of its employees unless and until such organization is certified by the Board. The Board's complaint in this proceeding was issued on March 22, 1945 and hearings were held before a Trial Examiner during April 1945. The IEA was permitted to intervene and presented evidence and ar-

guments in opposition to the contentions of the Board. The material facts on which the Board's order was based may be summarized briefly as follows:

Beginning in 1919 and prior to the passage of the Act the Company participated with its employees in an organization known as the "Congress" which dealt with questions of wages and working conditions. Upon passage of the Act in 1935 the Company immediately disbanded the Congress, and notified its employees of this fact and of their rights under the Act to select a labor organization of their own choosing.

The employees thereafter formed Employees Representative Organization (hereinafter referred to as "ERO") which bargained collectively with management for approximately nine years. During this period the Company without discrimination allowed representatives of the ERO to use company premises and other facilities and permitted such employees to receive their regular pay during the time spent in attending meetings or otherwise conducting the business of the ERO. Because of these facts and the circumstance that ERO followed the "Congress" the Board in or about June 1944 brought proceedings to disestablish ERO.

During the course of the Board's hearings on the ERO in July 1944 various employees who attended reached the conclusion that the ERO or a reorganization of ERO would not satisfy the Board and decided to form an entirely new organization (R. 224-225, 227-228, 232, 244). These employees, who had been representatives in the ERO (R. 246), thereupon enlisted the aid of other employees and began soliciting initiation fees and applications for member-

ship in what they advised was to be a "brand new organization" (R. 229-233). The organizers for the new union, which became known as the IEA, engaged the services of an attorney and at a mass meeting of employees held on August 30, 1944, attended by a very large majority of the employees, elected temporary officers (R. 234, 295-296; Board's Exhibit 8, R. 517-522). A Constitution and By-Laws were adopted at a subsequent mass meeting held on October 4, 1944 (R. 304; Board's Exhibit 8, R. 523-524).

Meanwhile, on September 6, 1944, the Board's Trial Examiner handed down his intermediate report recommending disestablishment of the ERO (Board's Exhibit 2, R. 474-493). On September 21, 1944 the Company complied with such recommendation, withdrew recognition from the ERO and posted throughout its plant notices of disestablishment in the form recommended by the Trial Examiner (Respondent's Exhibit 1, R. 607-608).

The IEA, claiming to represent a majority of the employees, made its first demand upon the Company for recognition on September 7, 1944 (R. 401), and this demand was rejected by the Company (R. 309-310, 402). When the Company's refusal to recognize IEA was communicated to its members at the mass meeting on October 4th strenuous disapproval was registered by the employees present (R. 312), who insisted upon immediate recognition by the Company (R. 523-524). A walkout, the first in the history of the Company, followed (R. 393), and the representatives of the IEA were sent back with instructions to force the issue with management (R. 392-393).

On October 6, 1944 a representative of a union affiliated with the American Federation of Labor called on the management claiming to represent certain workers in

the foundry of the Company's plant and asking for recognition of his union (R. 201-203). His claim was similarly rejected by the Company, and he did not press the issue further with the Company (R. 203).

The IEA, however, did press the issue, demanding recognition again and threatening another work stoppage (R. 278-280, 392, 404), and after a long and stormy session with management on October 12, 1944 agreement was obtained that the Company would recognize IEA if it could prove that it represented a majority of the Company's employees (R. 392, 404-405). Recognition was granted two days later after a check of IEA membership cards against the signatures on the payrolls showed a representation by IEA of over 600 employees out of a total of approximately 725 eligible employees (R. 316-317, 394-395).

The final organization of IEA was not completed until December, 1944, at which time permanent officers were elected (R. 184-186). This was approximately 2½ months after the first notices disestablishing ERO were posted. The Constitution and By-Laws had not been adopted until October 4, 1944 (R. 304; Board's Exhibit 8, R. 523-524), about 2 weeks after the posting of the disestablishment notices.

In addition to the foregoing facts bearing on the organization and recognition of IEA, the record showed that the Company took no part in the formation of IEA and contributed no financial or other support to it (R. 147, 235, 353-354, 397), nor did Company supervisors or officers at any time participate in or give encouragement to IEA (R. 147, 234, 296-297, 398-399). The evidence wholly failed to show any actions or statements by the Company hostile to other unions or any instance of discrimination

against members of other unions, but it affirmatively appeared that a union affiliated with the CIO freely carried on an active organizational campaign throughout this period (R. 399-401, 718-719). The desire of a large majority of the employees to be represented by IEA and their vigorous insistence that the Company must deal with IEA was repeatedly manifested (R. 245, 94, 126, 234, 392-393, 523-524, 350-351, 710-711, 718, 720).

Further important facts found by the Board were set forth in the Trial Examiner's report as follows (R. 695):

> "* * * the undersigned further finds that the IEA as an organization differs structurally from the ERO in that the constitution and by-laws of the former provide, *inter alia*, for regular meetings of the general membership, membership dues and initiation fees, and autonomy in the election of officers and further conduct of its business as a labor organization. Officers chosen, with few exceptions, have not been prominently identified with the prior company dominated organizations. Beginning with the organizational meeting of August 30, 1944, all of its meetings appear to have been held away from Respondent's premises and outside of working hours. No supervisors or officers of the Respondent have participated therein. The contract executed by the IEA and the Respondent on January 1, 1945, appears to have been agreed upon after several bargaining conferences and incorporates certain benefits not previously enjoyed by the employees. Standing alone, it would not seriously challenge the legitimacy of the organization. In short, it appears that the IEA has made a consistent effort to divest itself of the indicia of company domination (R. 695)."

Upon the foregoing facts the Board found that the Company was dominating and interfering with and con-

tributing support to the IEA in violation of Section 8(1) and (2) of the Act (R. 697-698), and by the order now under review the Board directed the Company to "disestablish" the IEA and prohibited the Company from bargaining or dealing with any labor organization representing its employees unless and until such organization was certified by the Board (R. 673-675).

Following issuance of the Board's order on March 6, 1946 the IEA served notice upon the Company that approximately 700 of the Company's employees had unanimously resolved at a meeting to resist the Board's order and that the IEA intended to contest the order in the courts and demanded its continued recognition by the Company (R. 710-711). A motion was then made by the Company for a stay of the order, and this was denied by the Board by its order of March 22, 1946 (R. 723). A motion by the IEA to reopen the proceedings before the Board or for an election or clarification of the Board's order was denied by an order of the Board dated March 29, 1946 (R. 726).

The Company petitioned the court below to review and set aside the Board's order on May 6, 1946, following the filing of a similar petition by the IEA. The Board answered and filed a cross petition for enforcement of its order. The court dismissed the petitions for review and entered its decree (R. 774-776) enforcing, with a slight modification in language, the order of the Board.

The Questions Presented

1. Whether, in the absence of any evidence of interference by the employer or its supervisors in the organization of an independent union and of any history of hostility

toward or discrimination against nationally affiliated unions, and where the great majority of the employees have affirmatively shown their desire for an independent union; the independent union differs structurally from a former union found to be company-dominated; its temporary president and vice-president, and all of its permanent officers were neither officers of nor prominently identified with the prior union; and its meetings have been held away from the company's premises and outside of working hours, the court below erred in permitting the Board to conclude that the independent union was also company-dominated from the circumstances that employees who had been prominent in the former union took a leading part during the formative stages of the independent union, but not thereafter, and that the preliminary organization of the independent union occurred before the disestablishment of the former union.

2. Whether, in the light of the record, the court below erred in holding that there was substantial support in the evidence for the Board's finding that petitioner had violated Section 8 (1) and (2) of the Act by dominating, interfering with and contributing support to the IEA.

3. Whether the court below has incorrectly interpreted the decisions of this Court dealing with the question of "successor unions" by considering that a decision of the Board on this question is for all practical purposes not open to review by the courts.

4. Whether the court below erred in failing to set aside the order of the Board as beyond the power and authority of the Board under the Act in that (a) the requirement that petitioner "disestablish" the union desired by the majority of its employees would not, upon the facts in

this record, effectuate the policies of the Act but would defeat such policies, and (b) the requirement that petitioner shall not recognize or deal with any labor organization as representative of its employees until and unless certified by the Board is unauthorized and in contravention of the principles of the Act.

Specification of Errors to be Urged

The Circuit Court of Appeals in affirming the order of the Board erred in its rulings on each and all of the foregoing questions.

Reasons for Granting the Writ

Like the case of *N. L. R. B.* v. *Keystone Steel & Wire Co.* now awaiting argument in this Court (October Term, 1946, Docket No. 544), this case presents for determination a conflict of authority between the court below and other Circuit Courts of Appeals. The existence of this conflict was recognized and urged upon this Court in the Solicitor General's petition for the writ of certiorari which was granted on November 12, 1946 (see *Keystone* petition, p. 14). The decision of the Seventh Circuit in the *Keystone* case was represented by the Solicitor General as being in conflict with earlier decisions of the Second Circuit, which in turn were relied upon by a majority of that court in deciding the case at bar. (See R. 764-765; *Keystone* petition, pp. 14-17).

In the case at bar the Second Circuit, as did the Seventh Circuit in the *Keystone* case, had before it an unaffiliated union which had been conceived and organized by employees without company interference. In each of the two cases a

previously existing union, found by the Board to have been company-dominated, had been voluntarily dissolved. In each case the Board concluded that the subsequently organized independent union was a "successor" to the earlier company-dominated union and therefore that it, too, was company-dominated.

In the *Keystone* case (155 F(2d) 553), the Board's conclusion was reversed by a divided court, the majority saying (at p. 558): "The Board further found that at the same time the members of KEA [the earlier company-dominated union] decided to abandon it, they also decided to establish Alliance, another unaffiliated union. This, of course, is a violation of no statute. *E. I. du Pont de Nemours & Co.* v. *N. L. R. B.*, 4 Cir., 116 F. 2d 388, certiorari denied 313 U. S. 571, 61 S. Ct. 959, 85 L. Ed. 1529; *De Bardeleben* v. *N. L. R. B.*, 5 Cir., 135 F. 2d 13." In the case at bar a divided court affirmed the conclusion of the Board and relied upon the following language from one of its earlier decisions* (R. 765): "* * * certainly when the sequence is not broken by a substantial period, marked at the outset by an outright repudiation of whatever has gone before, we shall regard the matter as not open to review unless the Supreme Court advises us to the contrary".

Other similarities in fact and conflicts as to the law between the case at bar and the *Keystone* and other Seventh Circuit decisions will be discussed in the accompanying brief. We shall also show there that holdings of the Fifth and Ninth Circuits are in accord with the Seventh Circuit and in conflict with the holding in the court below.

N. L. R. B. v. *Standard Oil Co.*, 138 F (2d) 885.

In addition, the Circuit Court of Appeals for the Second Circuit has gone so far in holding that the conclusion by the Board that an employer is dominating a "successor" union is for all practical purposes not open to review at all (R. 772), that it is not only in conflict with the other Circuit Courts referred to above but has, we believe, misinterpreted the decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The inappropriateness of the Board's order requiring a "disestablishment" on the facts of this case presents an important question as to the scope of the Board's power under Section 10(c) of the Act. More important, the provision of the Board's order, affirmed by the court below, prohibiting petitioner and its employees from engaging in any of the rights of collective bargaining except through a union which has received the prior certification and approval of the Board, presents a novel and important question in the administration of the National Labor Relations Act which should be passed upon by this Court.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, it is respectfully submitted that this petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

NEPTUNE METER COMPANY,
Petitioner.

By EDWARD L. COFFEY,
Counsel for Petitioner.

January 17, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NEPTUNE METER COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

THE DECISION OF THE COURT BELOW IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN *KEYSTONE STEEL & WIRE CORP.* v. *N.L.R.B.*, 155 F. (2d) 553, NOW AWAITING ARGUMENT IN THIS COURT (OCTOBER TERM 1946, DOCKET 544) AND WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The conflict between the circuits is illustrated by the case of *Keystone Steel & Wire Co.* v. *N. L. R. B.*, 155 F. (2d) 553 (1946), certiorari granted by this Court November 12, 1946, where the Circuit Court of Appeals for the Seventh Circuit held there was no substantial evidence that a "successor" union was company-dominated. The court so held despite evidence relied upon by the Board showing

that officers in a former company-dominated union took a leading part in its formation, that the independent union was quickly formed and promptly recognized by the company without verification of its claim to a majority, that the independent succeeded to the treasury of the company-dominated union and adopted a similar constitution, that the company never posted notices disestablishing the old union or announced to its employees at large that it would respect their rights to select a union of their own choosing, that company supervisors expressed hostility to other unions and various supervisory employees joined the independent, and that the company discriminated against other unions in applying its rule against solicitation on company time. The Court of Appeals for the Seventh Circuit held that such facts do not support the inference that the independent was a successor to the former union "in any material and substantial respect."

More specifically, the court also held (p. 558):

> "The fact that the former officers of K. E. A. took the leading part in the formation of Alliance and eventually became its officers is of no importance in determining the question of domination."

The Seventh Circuit had previously rejected a similar inference of the Board in *Foote Bros. Gear & Machine Corp.* v. *N.L.R.B.*, 114 F. (2d) 611, 619 (1940), remanded 311 U. S. 620 (1940), reaffirmed 121 F. (2d) 802 (1941):

> "Egner's active participation in the affairs of the Independent is cited by the Board as evidence that the former was merely a continuation of the representative plan because Egner had formerly been a leader of it. Such a conclusion is unwarranted. It is natural for a man who is active in union affairs

> to continue such activities because of his liking for them. The end of the representation plan did not change Egner's personality, his ability, or his views."

In contrast with this approach, the majority opinion in the case at bar contains the following (R. 763):

> "On the basis of inferences from these facts thus found, the Board further found, in effect, as follows: The fact that the company failed to disestablish E. R. O. before the formation of I. E. A. and the fact that I. E. A. was initiated and sponsored by a group of E. R. O. officers and representatives suggested to the employees a substantial identity between I. E. A. and E. R. O.; the employees therefore would reasonably conclude that the company approved I. E. A. as it had E. R. O. and the Congress, so that the employees' choice of I. E. A. was 'not as free as the statute demands.'"

The decision below is also in direct conflict with other holdings of the Seventh Circuit.[1]

The Fifth Circuit Court of Appeals, in dealing with the question of successor unions, is also in conflict with the Second Circuit. This is evidenced by the Fifth Circuit's refusal to enforce the Board's order disestablishing a successor union in *Humble Oil & Refining Co.* v. *N.L.R.B.*, 113 F. 2d 85 (1940) on facts very similar to those in the case at bar.

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[1] *A. E. Staley Manufacturing Co.* v. *N.L.R.B.*, 117 F. (2d) 868 (CCA 7th, 1941);
N.L.R.B. v. *Duncan Foundry & Machine Works, Inc.*, 142 F. (2d) 594 (CCA 7th, 1944);
Commonwealth Edison Co. v. *N.L.R.B.*, 135 F. (2d) 891 (CCA 7th, 1943);
N.L.R.B. v. *Gutmann & Co.*, 121 F. (2d) 756 (CCA 7th. 1941);

In that case, the Court stated in commenting on the activities of the leaders of the old organization in the formation of the new (at p. 92),

> "The Board lays some stress on the fact that Thomas, who first set to work on the Baytown constitution, had been a secretary of the employees' representatives under the Joint Conference plan and had been a leader in the Security League drive against the union. He was a man of college education and well qualified to lead. He was an employee without any supervisory authority. We see nothing either in his familiarity with the old plan or in his pronounced opposition to the union which would disqualify him to lead in the new organization."

Other decisions of the Fifth Circuit in the field of successor unions are also in conflict with the Second Circuit,[2] and the only reported decision in the Ninth Circuit dealing with the question also shows a conflict with the decisions in the Second Circuit Court of Appeals.[3]

The error of the court below in sustaining an order of the Board based upon facts which courts of other circuits have held do not constitute substantial evidence, calls for the exercise of this Court's powers of review.

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[2] *Magnolia Petroleum Co.* v. *N.L.R.B.*, 112 F. (2d) 545 (CCA 5th, 1940);
N.L.R.B. v. *El Paso Electric Co.*, 133 F. (2d) 168 (CCA 5th, 1943).

[3] *N.L.R.B.* v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815 (CCA 9th, 1942).

II

THE RULING OF THE COURT BELOW THAT THE DECISION OF THE BOARD ON THE "SUCCESSOR UNION" ISSUE IS FOR ALL PRACTICAL PURPOSES NON-REVIEWABLE WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE HOLDINGS OF THIS COURT.

The question of substantial evidence is of particular importance in this case in view of the position taken by the Circuit Court of Appeals for the Second Circuit that findings of the Board as to illegal "successorship" are not open to review by the courts. Its decision can be explained only by the extraordinary limitation imposed by it upon its own powers of review. In its opinion, the court followed and applied its former decision in the case of *N. L. R. B.* v. *Standard Oil Co.*, 138 F. (2d) 885 (CCA 2nd, 1943) and, quoting from its opinion in that case, stated (R. 765):

> "* * * 'We understand the law to be that the decision of the Board upon that issue is for all practical purposes not open to us at all; certainly not after we have once decided that there was "substantial" evidence that the "disestablished" union was immediately preceded by a period during which there was a "dominated" union * * * and certainly when the sequence is not broken by a substantial period, marked at the outset by an outright repudiation of whatever has gone before, we shall regard the matter as not open to review unless the Supreme Court advises us to the contrary.' We know of no subsequent Supreme Court decision which so advises us."

This holding is based, we submit, upon a misunderstanding of the law as laid down in the decisions of this Court.

It has perpetuated an error which deprives petitioner of a fair judicial review and which should be reviewed and corrected by this Court. By having held that the issue of "successorship" in this case is "not open to review", the court below appears to have departed from the rule of substantial evidence which requires, as this Court has stated, that there be evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred". *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299 (1939).

By excessively limiting its powers of review the court below has reached a result wholly unjustified under the decisions of this Court. This Court has indicated the factors which will "lend credibility" to an inference of company domination in a successor union case. Such factors are the failure of the employer to disestablish a former company-dominated union, acts by the employer displaying hostility or discriminations against other unions, or participation or influence exerted by foremen or supervisors in the organization of an independent union—all of which facts this Court has held may "make tenable" an inference by the Board that the employer has interfered with the free choice of his employees in the selection of a labor organization. See *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72 (1940); *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584 (1941); *N. L. R. B.* v. *Southern Bell Tel. & Tel. Co.*, 319 U. S. 50 (1943).

In the present case such elements are entirely lacking. Petitioner's record is free from anti-union bias. Its officers, foremen and supervisors have taken no action, directly or indirectly, to assist the organizing activities of the IEA or to oppose those of any rival union. Petitioner

has formally withdrawn recognition and posted notices disestablishing a former organization in the very manner directed by the Board (R. 388-389, 395-396). The absence in this case of such factors as might lend credibility to a finding of company domination is an indication of the extent to which the court below has misinterpreted the decisions of this Court.

In this respect, as Judge Swan points out in his dissenting opinion below (R. 772), the Circuit Court of Appeals has gone much further than have other circuit courts. Courts in other circuits have not considered that they are bound, for all practical purposes, to accept the Board's inference that an employee is dominating a so-called successor union but on the contrary have conceived that their duty as reviewing courts under the statute requires a careful review of the evidence and an independent determination whether the Board's inferences and conclusions are reasonable and fair. Thus, the Circuit Court of Appeals for the Fifth Circuit in setting aside the Board's finding of company-domination of an alleged "successor union", has stated:

> "When then, as here, the Board applies to this court for enforcement of its order, and there is a substantial challenge of the findings and order as unsupported by evidence, it is the duty of this court to examine the evidence for itself, not, of course, to determine what fact inferences it, acting as a trier, would have drawn, what fact findings it would have made, but to determine whether reasonable minds having no interest as accuser or otherwise in the result, but wholly impartial, could, upon the evidence, have legally and fairly drawn the fact inferences, made the fact findings. And, when, it is clear

> as here, that the material evidence, is entirely without dispute; that no witness denies a fact to which another testifies; that in short, the findings are based, not upon conflicting but upon non-conflicting evidence, our determination as to whether the Board's findings must stand or fall must not rest upon whether the Board deems that the inferences it drew are supported by substantial evidence. It must rest upon whether measured by the settled rules governing the review of jury verdicts, it is the opinion of this court that the undisputed facts are in law capable of fairly giving rise to the fact inferences the Board has drawn." *Magnolia Petroleum Co.* v. *N. L. R. B.*, 112 F. (2d) 545, 549 (1940).

To the same effect, see *Foote Bros. Gear & Machine Corp.* v. *N. L. R. B., supra,* at page 621.

It is a question of utmost importance to employers and employees affected by the National Labor Relations Act that the existing conflict between the circuits in "successorship" cases should be determined and that the proper powers of review by the courts should be clarified and affirmed by this Court.

III

WHETHER THE BOARD HAS POWER TO MAKE AN ORDER WHICH, IN EFFECT, PROHIBITS PETITIONER FROM BARGAINING WITH ANY BUT A NATIONALLY AFFILIATED UNION ALTHOUGH ITS EMPLOYEES PREFER TO BE REPRESENTED BY AN INDEPENDENT UNION PRESENTS A QUESTION OF IMPORTANCE IN THE ADMINISTRATION OF THE ACT.

Enforcement of the Board's order in this case amounts to a permanent injunction requiring petitioner to refuse all

recognition to an independent union selected by the large majority of its employees and recognized by petitioner only after the vigorous insistence of its employees, enforced by a walkout and threat of a further walkout in its plant. The order further requires petitioner to refuse to deal with any labor organization representing its employees unless certified by the Board.

It is apparent that compliance with the decree can be achieved only at the cost of a serious conflict with the wishes of petitioner's employees, resulting in probable industrial strife and an interference with the employees' freedom of choice, which is opposed to the basic purposes of the National Labor Relations Act. There is serious doubt whether an order suspending all collective bargaining between an employer and his employees can be imposed under a statute designed to protect the right to bargain collectively. In short, as Judge Swan states in his dissenting opinion below (R. 773), "the 'remedy' applied destroys the very right which it purports to preserve, namely, the right 'to bargain collectively through representatives of their own choosing'." Furthermore, this order will, contrary to the policies of the Act, inexorably drive petitioners' employees into a nationally affiliated union in order to resolve their dilemma. For, as Judge Swan pointed out (R. 773), "The provision in the order of March 6th forbidding recognition of any union until it shall be certified by the Board will necessarily result either in compelling the employees to join a union affiliated with C. I. O. or A. F. of L., or in leaving them without a collective bargaining representative for an indefinite period of time, * * *". (See *N. L. R. B.* v. *Donnelly Garment Co.*, October Term 1946,

Docket Nos. 38-39, now awaiting decision by this Court; and see R. 348-351).

The power of the Board to make affirmative orders under Section 10(c) of the Act extends only to measures which will "effectuate the policies" of the Act. In enforcing the Board's order in this case the court below has, we believe, failed to heed the admonition of this Court that the Board is without power to impose a penalty or to select a remedy which is arbitrary and unreasonable.

N. L. R. B. v. *Fansteel Metalurgical Corp.*, 306 U. S. 240 (1939);

Consolidated Edison Co. v. *N. L. R. B.*, 305 U. S. 197 (1938).

In no previous case, to our knowledge, has the Board imposed such broad and sweeping requirements. The power of the Board so to act presents a novel and important question which should be passed upon by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. COFFEY,
Counsel for Petitioner.

APPENDIX

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 USC§ 151, et seq.) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the emloyees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the

right at any time to present grievances to their employer.

* * * * * * * *

Sec. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."